DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0491
STATE GROSS RETAIL AND USE TAXES
For Years 1994, 1995, and 1996

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ISSUES

I. **Sales / Use Tax Assessment**: Applicability of the Gross Retail Tax to Purchases of UPC / Bar Code Labels Affixed to Taxpayer's Non-returnable Containers.

Authority: IC 6-2.5-5-6; 45 IAC 2.2-5-14; 45 IAC 2.2-5-14(e)(1); 45 IAC 2.2-5-14(e)(3).

The taxpayer protests the auditor's determination that use tax should be assessed on certain labels affixed to non-returnable containers. The auditor determined that the labels were taxable because they were not incorporated by the taxpayer as a material or integral part of tangible personal property produced for resale. The taxpayer argues that the labels, which display UPC or bar codes, are items directly used in the direct production of finished goods and are, therefore, exempt.

II. **Sales / Use Tax Assessment on Electrical Consumption**: Results of Energy Consumption Audit.

Authority: IC 6-2.5-4-5(c)(3); IC 6-8.1-5-1(b); 45 IAC 2.2-4-13(e).

The taxpayer protests the auditor's determination that a portion of taxpayer's electrical consumption during the year 1996 was subject to sales tax because the percentage of exempt usage for the year 1996, as determined by an on-site utility study, failed to reach the 50% threshold necessary to qualify for the "predominant use" exemption. The taxpayer argues that the electric utility study employed an incorrect method to determine the electrical consumption of certain items of taxpayer's non-exempt equipment. Purportedly, the use of this particular method resulted in an energy audit that substantially overstated the amount of taxpayer's non-exempt electric usage.

III. **Sales / Use Tax Assessment on Certain Equipment**: Manufacturing Equipment Used in the Direct Production of Taxpayer's Tangible Personal Property.

Authority: IC 6-2.5-5-3(b); IC 6-8-5-1(b); 45 IAC 2.2-5-8; 45 IAC 2.2-5-8(a); 45 IAC 2.2-5-8(b); 45 IAC 2.2-5-8(c); 45 IAC 2.2-5-8(d); 45 IAC 2.2-5-10; 45 IAC 2.2-5-10(c); 45 IAC 2.2-5-16; 45 IAC 2.2-5-17.

The taxpayer protests the auditor's determination that various items of equipment did not qualify for the manufacturing exemption because they lacked an essential and integral relationship with the taxpayer's manufacturing process. The taxpayer maintains that certain of these items – in particular label printers, die cut stencils, tape dispensers, coil straighteners – are equipment that does play a vital role in the manufacturing of taxpayer's final product and, therefore, qualify for the manufacturing exemption.

IV. Sales and Use Tax Assessment on Packaging Materials: Packing Materials Placed Within Shipping Enclosures.

Authority: IC 6-2.5-5-3; IC 6-2.5-5-9(d); General Motors Corp. v. Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); 45 IAC 2.2-5-16; 45 IAC 2.2-5-16(a); 45 IAC 2.2-5-16(c)(1); 45 IAC 2.2-5-16(d)(1); 45 IAC 2.2-5-16(e)(2).

The taxpayer protests the auditor's determination that specific packing materials, placed within or used to enclose the taxpayer's shipping containers, are subject to the use tax because, according to the auditor, these items do not in any way qualify for an exemption. The taxpayer maintains that these packing materials – corrugated pads, partitions, spacers, separators, stuffing materials, filling materials, stretch film, strapping materials, sealing tape, top caps – are necessary to protect the packaged goods from harm and to provide the taxpayer's customers with undamaged, marketable goods.

V. Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

The taxpayer maintains that, based upon the its diligent good faith efforts to comply with the state's tax regulations, the ten-percent negligence penalty should be entirely abated.

STATEMENT OF FACTS

The taxpayer is a manufacturer of a variety of automobile safety equipment including marker lights, reflectors, turn signals, and rear view mirrors. The taxpayer manufactures the component parts in Indiana. Some of the component parts are then assembled at the Indiana site into finished products. The other components are packed, shipped, and then assembled at the taxpayer's assembly facility located in Mexico. The finished goods are

Taxpayer's Bar Code / UPC labels, affixed to the outside of taxpayer's containers are not incorporated into the taxpayer's finished product and, consequently, the purchase of those labels – or materials used to produce the labels – is not exempt from the imposition of the gross retail tax. 45 IAC 2.2-5-14 exempts those labels which are affixed to a finished product which is itself "produced for sale by the purchaser." 45 IAC 2.2-5-14(e)(3). The taxpayer is in the business of manufacturing, as a finished product, various automobile parts. In facilitating that manufacturing process, the taxpayer has adopted a sophisticated labeling, tracking, and inventory control system. This integrated system, of which the

labels are simply the most conspicuous component, is intended for the benefit of the taxpayer. Once the labels leave taxpayer's control, the label's utility is over and their continued presence, as part of the product packaging, is an irrelevancy. When the downstream consumer acquires one of taxpayer reflectors, lights, or other safety devices, the Bar Code / UPC label has long since served its purpose and has been discarded along with the shipping container in which the individual items were originally packaged and shipped.

Because taxpayer's Bar Code / UPC labels are not incorporated into the tangible personal property taxpayer produces for resale, because the labels do not become a material part of the item purchased by consumer, and because the labels are used by taxpayer for its own inventory and record keeping purposes, the purchase of the labels is entirely subject to the imposition of the state's gross retail tax.

FINDING

Taxpayer's protest is respectfully denied.

II. **Sales / Use Tax Assessment on Electrical Consumption**: Results of Energy Consumption Audit.

DISCUSSION

At the request of the taxpayer, the Department provided assistance in the preparation of a utility study. One portion of that audit, the electric utility study, conducted with the assistance of Department of Revenue personnel, resulted in a determination that taxpayer's 1996 electrical consumption was less than 50% attributable to the taxpayer's manufacturing process. Specifically, the electric utility study concluded that 44.1% of taxpayer's electrical consumption could be attributed to exempt purposes. The 1996 results differed from determinations made for 1994 and 1995 in which the predominant use exemption (45 IAC 2.2-4-13(e)) was applicable because more than 50% of taxpayer's electrical usage was attributable to excepted purposes.

Under IC 6-2.5-4-5(c)(3), the sale of electricity used for the purpose of manufacturing is exempt from sales or use tax. However, because taxpayer's electrical service is metered from a single source and is used for both manufacturing and non-manufacturing purposes, taxpayer's entire electrical bill is subject to tax. Taxpayer can claim a "predominant use" exemption under the provisions of 45 IAC 2.2-4-13(e), if "more than fifty percent (50%) of [taxpayer's] utility services . . . are consumed for excepted use."

The utility study employed the following methodology. All of taxpayer's electrical equipment was sorted into production and non-production categories. The electrical consumption for non-production equipment was determined by reading the "face plate" of each item of equipment. The annual electrical consumption for each non-exempt piece of equipment was calculated by multiplying the power rating by the number of hours of

daily operation by the number of days of operation each year. The total electrical consumption, attributable to non-exempt purposes, was subtracted from the actual amount of electricity consumed during the year as established by the taxpayer's electric utility bills.

The taxpayer argues that, in conducting the electric utility study, the Department erred in its methodology of determining the electrical rating for individual items of equipment. Taxpayer maintains that determining the electrical rating for individual items of equipment by reading the "face plate" rating inflates the amount of actual electrical usage. In refuting the Department's calculations, the taxpayer randomly chose six items of equipment, asked an electrical contractor to meter the actual electrical consumption of that equipment, and compared those results with the results obtained by the Department in the original study. The taxpayer maintains that the results of its own testing demonstrates that the electrical consumption of the six selected items is approximately 80% less than the figure determined in the original audit.

The sample of six items of equipment represents a very small sampling of the hundreds of items listed within the original energy audit. While a comparison of the Department's estimated consumption rates and the taxpayer's measured rates reveals some substantial differences, it would be inappropriate to extrapolate the consumption rates determined by the taxpayer's sampling method to the hundreds of items listed on the seventeen pages of the original utility study. The taxpayer has failed to overcome the presumption of correctness afforded the auditor's original determination as provided under IC 6-8.1-5-1(b).

However, the taxpayer has raised substantive issues – supported by independent, quantitative measurements – such that it would be appropriate for the Department to revisit the issue and to conduct a supplemental audit of the taxpayer's utility usage. This recommendation is supported by the fact that the conclusions reached in the original utility study were exclusively based upon readings taken from the taxpayer's non-production equipment. Therefore, it is requested that a supplemental utility usage audit encompassing taxpayer's 1996 tax year be conducted.

FINDING

Taxpayer's protest is sustained subject to audit review.

III. **Sales / Use Tax Assessment on Certain Equipment**: Manufacturing Equipment Used in the Direct Production of Taxpayer's Tangible Personal Property.

DISCUSSION

The taxpayer protests the auditor's determination that four items of equipment do not qualify for the manufacturing exemption available under 45 IAC 2.2-5-10 because the equipment does not have an essential and integral relationship with the taxpayer's

manufacturing process. The four items of equipment are label printers, die cut stencils, tape dispensers, and coil straighteners.

IC 6-2.5-5-3(b) provides that "[t]ransactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." 45 IAC 2.2-5-10(c) amplifies that code section by stating that, in order for the equipment to be considered "directly used," the item of equipment must "have an immediate effect on the tangible personal property being processed or refined. The property has an immediate effect on the article being produced if is an essential and integral part of an integrated process which processes or refines the tangible personal property." Id.

The label printer does not meet the statutory requirement. It is used by the taxpayer to produce UPC / Bar Code labels affixed to the outside of the taxpayer's product containers. These labels are used by the taxpayer for the purpose of warehouse tracking and inventory control. The labels provide information concerning the quantity and identity of the items contained within the product containers. The label printer does not act upon, have an effect on, or play an essential and integral part in the production of taxpayer's automotive and safety equipment.

Taxpayer pays the cost of certain "die cut stencils." From taxpayer's description, it would appear that these stencils are used in the preparation and fabrication of the custom designed cardboard containers taxpayer uses in shipping manufactured components and finished products. The cost of the stencils, the actual dies, and other associated costs is initially incurred by taxpayer's supplier and is then passed along to the taxpayer. Taxpayer maintains that the die cut stencils are entitled to the manufacturing exemption available under 45 IAC 2.2-5-8. That regulation exempts from the gross retail tax the purchase of "tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property . . ." 45 IAC 2.2-5-8(a). The purchase of the equipment is exempt when it is "directly used by the purchaser" in an "integrated process which produces tangible personal property." 45 IAC 2.2-5-8(b), (c). The taxpayer misapprehends the applicability of the regulation. Even if it could be demonstrated that the die cut stencils were used in directly producing the cardboard shipping containers, it is the manufacturer of the containers – not taxpayer – which is entitled to the exemption. The exemption is clearly available to the manufacturer of tangible personal property and not the downstream user of that property. Taxpayer is in the business of producing automobile accessories and components and not cardboard containers.

However, the cost of the die cut stencils -- passed along to the taxpayer as a serverable charge distinct from the price of the cardboard containers produced by those stencils -- should have been included as part of the integral cost of the cardboard containers. Accordingly, to the extent the cardboard containers are exempt as non-returnable

packaging under 45 IAC 2.2-5-16, the apportionable cost of the die cut stencils is also exempt.

The third category of equipment at issue consists of tape dispensers, which the taxpayer maintains are used in its manufacturing process. The tape dispensers are used to dispense a protective film-like tape. This tape serves two purposes. The tape holds plastic reflective lenses in position until a frame is placed around the lens. The tape is used to protect the surface of the lens during handling and shipping. After the lens reaches the ultimate consumer, the protective tape is normally removed. Taxpayer maintains that the tape dispensers qualify for the manufacturing exemption provided under 45 IAC 2.2-5-8. Taxpayer errs. In order for the exemption to apply, the equipment at issue must be used by the purchaser "in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property." 45 IAC 2.2-5-8(b). Taxpayer has failed to establish a sufficient factual basis upon which to determine if the tape dispensers are "directly used in the [taxpayer's] production process." IC 2.2-5-8(c). Accordingly, that portion of the taxpayer's protest regarding its tape dispensers must be denied.

Finally, taxpayer seeks a sales tax exemption for the purchase of coil straighteners. During the taxpayer's manufacturing process, coils of metal (various steel alloys, brass, etc.) are positioned near or above the production equipment. As production takes place, the coiled metal is fed into these machines. However, the coiled metal has an acquired and inherent "coil set" which prevents the metal from being directly used by the production machinery. Taxpayer Memo, Eng'g Dep't, Sept. 29, 2000. The "coil set" is an innate curvature of the metal somewhere between perfectly flat and the degree of curvature as defined by the outside coil circumference. Id. The amount and degree of "coil set" is dependent on the type of metal, hardness, temper, and other physical properties of the metal. Id. The coil straighteners act upon the metal as it is fed into the production machinery in such a way as to insure that the "coil set" is removed and the metal is correctly aligned. Without the coil straighteners, the "coil set" would prevent proper alignment of the metal, production machinery would not function properly, and the taxpayer's products would consist of, to use the taxpayer's words, "complete scrap." The auditor determined that the coil straighteners were non-production equipment that did not warrant exemption from the sales tax because the coil straighteners did not have an effect on the taxpayer's products. Instead, the auditor found that, because the staighteners' only function was to straighten and align the coiled metal, the straightener had no immediate effect on the taxpayer's products and, in fact, was used prior to the actual manufacturing process.

Taxpayer employs two types of coil straighteners. The first is a "pull through" straightener that is built into and is an integral part of the metal feeder attached to the production machinery. This type is used for lighter gauge coiled metals. The second type of coil straightener is an independent, stand-alone model located immediately between the uncoiler system (supporting the coiled metal) and the metal feeder. Both types of straightener consist of an array of five, seven, or nine adjustable rollers through which the metal is passed. The rollers alternately work the metal up and down – to varying degrees

– with the result that the metal emerges from the straightener with the inherent curvature of the metal having been removed.

45 IAC 2.2-5-8 allows the taxpayer to purchase machinery, tools, and equipment without paying the gross retail tax when the equipment is used in the direct production of tangible personal property. 45 IAC 2.2-5-8(a) specifies that the exemption is limited to that equipment "used by the purchaser in direct production." 45 IAC 2.2-5-8(c) specifies that "directly used" means that the equipment has "an immediate effect on the article being produced." Refining the definition one further step, the regulation states that "[p]roperty has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property." Id.

The taxpayer's coil straighteners fall within the exemption provided under 45 IAC 2.25-8 because the straighteners act in such a way as to have an effect on the tangible personal property being produced by the taxpayer and because the coil straighteners are within the taxpayer's production process. The coil straighteners are more than simple transport devices used to facilitate the transfer of the raw metal from the coil reel to the first production machine. Instead, the coil straightener acts upon the metal to change the metals' inherent structure in the same manner that a punch press, a lathe, or cutting torch act upon raw metals. After the metal has gone through the coil straightener, the metal that is dispensed is different from the metal originally on the metal coil having been physically transformed in an initial step of taxpayer's production process.

FINDING

Taxpayer's protest is denied in part and sustained in part.

IV. **Sales and Use Tax Assessment on Packaging Materials**: Packing Materials Placed Within Shipping Enclosures.

DISCUSSION

Taxpayer protests the assessment of the gross retail tax on the purchase of certain packing materials. These materials consist of corrugated pads, partitions, spacers, separators, stuffing materials, filling materials, stretch film, strapping materials, sealing tape, and top caps. The taxpayer argues that its customers expect their delivered products to arrive in pristine condition. Therefore, according to the taxpayer, these particular packaging materials are exempt under the provisions of 45 IAC 2.2-5-16 because, without the packaging material, the products would not arrive at the end user in a usable condition.

Taxpayer sets forth a secondary argument. Some of these same materials are also used for making interdivisional transfers of work-in-progress from the taxpayer's Indiana site to its assembly site in Mexico. According to the taxpayer, as materials used to facilitate the interdivisional shipment of work-in-progress, the packing materials are exempt under the

terms of the decision reached by the Tax Court in General Motors Corp. v. Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991).

The auditor determined that the packaging materials did not qualify for an exemption under 45 IAC 2.2-5-16.

The taxpayer's use of these particular packing materials falls within two general categories and is addressed as such.

A. Packing Materials Used in Making Interdivisional Transfers.

The taxpayer argues that its purchase of certain packing materials, used to protect component parts during transfer from its primary manufacturing plant to the taxpayer's final assembly plant in Mexico, is exempt from the gross retail tax. Taxpayer asserts its claim under the principles set forth in General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991). Accordingly, the relevant authority for taxpayer's claim is based on IC 6-2.5-5-3(b) which states that "[t]ransactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing or other tangible personal property." Superficially, the taxpayer's status (and the legitimacy of its claim to the tax exemption) is similar to that of the automobile manufacturer in General Motors.

In General Motors, the automobile manufacturer shipped component parts to its assembly plants and, as taxpayer here has done, claimed an exemption for the packaging materials used to protect the component parts during those inter-divisional transfers. The court held that the automobile manufacturer's packing materials were part of the integral process whereby the manufacturer produced its finished product. Therefore, the automobile manufacturer's packing materials were exempt under IC 6-2.5-5-3. The court came to its determination after finding that the automobile manufacturer's widely separated production facilities formed a cohesive, singular production unit in which the claimant's "manufacture of finished marketable automobiles [was] accomplished by one continuous integrated production process within which the transport of parts from component plants to assembly plants [was] an essential and integral part." General Motors, 578 N.E.2d at 414. The court's holding, finding that the packing materials used in interdivisional transfers were exempt from the gross retail tax, included such "expendable packing materials, [] as corrugated cardboard cartons, separators, liners, pads, wrapping paper, plastic plugs, pallets, and other items to protect the parts during shipment to assembly plants . . . ." Id. at 399. Similarly, the taxpayer is making interdivisional transfers of partially completed work in progress with the intent of producing its most marketable finished good. Similarly, taxpayer seeks an exemption for a variety of packing materials used in those interdivisional transfers. Similarly, at the completion of its manufacturing process, taxpayer has a goal of producing its most marketable finished good.

However, the analogy between the automobile manufacturer claimant in General Motors and taxpayer breaks down upon closer examination. The tax court in General Motors allowed the automobile manufacturer the exemption because the court found that the automobile manufacturer's "integrated production process terminates the production of the most marketable finished product, e.g., the product actually marketed." Id. at 404. Essentially, the General Motors court redefined the various far-flung automobile manufacturing facilities as *one continuous, integrated, manufacturing process* such that the automobile manufacturer's purchase of packing materials, used to facilitate the transfer of unfinished goods within that integrated production process, was essential and integral to the taxpayer's manufacturing process and, thereby, was entitled to the manufacturing exemption available under IC 6-2.5-5-3. Among the evidence cited as relevant in determining that automobile manufacturer operated a continuous, integrated, manufacturing process, the court found that automobile manufacturer's personnel, located at its various plants, together collaborated to develop new products, together designed and engineered new parts and packing materials, together planned the production processes for new parts, and together mutually solved problems and ensured product quality. Id. at 403 n.3. In addition, the court held that the "continuity of production exist[ed] between [automobile manufacturer's] different plants [was] demonstrated by the standard practice of shifting certain production operations back and forth between component and assembly plants when necessary for more efficient operation." Id.

Taxpayer has failed to demonstrate that it is entitled to the manufacturing exemption available under IC 6-2.5-5-3. In seeking the exemption, the taxpayer "has the burden of showing the burden of showing the terms of the exemption statute are met." Id. at 404. In contrast to the burden of proof established by the automobile manufacturer in General Motors, the taxpayer has not demonstrated that its manufacturing plant and its assembly plant are operated as one continuous and integral operation. Taxpayer does not come within the purview of General Motors because it fails to demonstrate that the manufacturing work taking place at its Indiana facility and its Mexican facility constitutes "one continuous integrated production process." Id. at 404. Accordingly, the taxpayer is not entitled to an exemption from the state's gross retail tax for the purchase of packing materials used to protect interdivisional shipments of partially finished goods between its primary manufacturing facility and its Mexican assembly plant. The Department must decline the opportunity to expand the holding in General Motors beyond the unique factual setting of that particular case.

B. Packing Materials Used in Shipping Finished Goods to Taxpayer's Intermediate Distributors.

IC 6-2.5-5-9(d) provides that "[s]ales of wrapping materials and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as non-returnable packages for selling the contents that he adds." The applicable companion regulation is found at 45 IAC 2.2-5-16(a) which states that "[t]he state gross retail tax shall not apply to sales of non-returnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling

contents to be added." The regulation goes on to state that, in order to qualify for the exemption, "non-returnable wrapping materials and empty containers must be used by the purchaser in the following way: (A) The purchaser must add contents to the containers purchased; and (B) The purchaser must sell the contents added." 45 IAC 2.2-5-16(d)(1).

Certain of the taxpayer's packaging materials are inserted into non-returnable containers as protection for the enclosed products. Those materials include corrugated pads, partitions, cardboard separators, spacers, styrofoam packing peanuts, stuffing materials, filling materials, and molded forms. Because these materials are used to physically separate and protect the taxpayer's products from damage, they are exempt from the gross retail tax.

The taxpayer's purchase of strapping materials is exempt from the gross retail tax under 45 IAC 2.2-5-16(c)(1) which states that "[n]onreturnable containers and wrapping materials including steel strap . . . ." are exempt from state gross retail tax.

Taxpayer describes "top caps" as paper skid sheets used to stabilize packaging configurations for shipment to . . . customers." Taxpayer Memo, October 9, 2000. Accordingly, the top caps constitute non-returnable wrapping materials destined for the taxpayer's customer the purchase of which is exempt from the sales tax under 45 IAC 2.2-5-16. Therefore, to the extent that taxpayer's top caps, stretch film, and sealing tape constitute non-returnable wrapping materials destined for the taxpayer's customers, the taxpayer's purchase of these items is exempt from the imposition of the state's gross retail tax.

FINDING

Taxpayer's protest is denied in part and sustained in part.

V. Abatement of the Ten-Percent Negligence Penalty.

DISCUSSION

The taxpayer has requested that the ten-percent negligence penalty, assessed by the auditor under authority of IC 6-8.1-10-2.1, be abated. The taxpayer argues that it acted in good faith and with reasonable diligence in determining the taxability of those items addressed within its protest. In addition, the taxpayer maintains that the fact that it has policies and practices in place to resolve tax issues, is a further demonstration of its good faith and diligence.

The Department determined that imposition of the negligence penalty was appropriate because the taxpayer was inconsistent in its coding and accrual of use tax, failed to have exemption certificates on file with its utility providers, and because the taxpayer had remitted less than one-half of its use tax.

The Department's regulations provide guidance in determining those instances in which imposition of the ten-percent negligence penalty is appropriate. 45 IAC 15-11-2(b) defines negligence as "the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." The taxpayer's negligence may be inferred from its "carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." Id. IC 6-8.1-10-2.1(d) requires that the Department waive the penalty upon a showing that the taxpayer's failure to pay the tax delinquency was due to "reasonable cause and not due to willful neglect." In order to establish "reasonable cause," 45 IAC 15-11-2(c) requires that the taxpayer demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

The taxpayer has failed to demonstrate that, in those areas of concern raised by the auditor, it exercised the degree of reasonable care required to justify waiving the ten-percent negligence penalty. Although some of the questions raised by the taxpayer involve technical issues of interpretation and applicability, given the totality of the circumstances, waiver of the penalty is nonetheless inappropriate.

FINDING

Taxpayer's protest is respectfully denied.